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Supreme Court, U.S.
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No. 04-327

In The

Supreme Court of the United States

SSA GULF, INC.,

Petitioner,

v.

EUNICE HERNANDEZ, INDIVIDUALLY AND ON BEHALF OF DECEDENT, JOSEPH HERNANDEZ,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

EUNICE HERNANDEZ'S BRIEF IN OPPOSITION

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INTRODUCTION

Plaintiff/Respondent, Eunice Hernandez, respectfully submits this Brief in Opposition to the Petition for Writ of Certiorari filed by defendant, SSA Gulf, Inc. ("SSA Gulf"). Respectfully, the petition should be denied.

The district court remanded the case under 28 U.S.C. §1447(c) due to a lack of subject matter jurisdiction. As a result, 28 U.S.C. §1447(d) prohibited appellate review of the remand order. Nevertheless, SSA Gulf petitioned the United States Fifth Circuit Court of Appeals for a writ of mandamus, seeking review of the remand decision. Given the lack of appellate jurisdiction, the Fifth Circuit properly rejected defendant's request for mandamus relief.

Moreover, the petition for writ of certiorari should be denied because the remand ruling is in harmony with the case law, and no inter-circuit conflict exists. The district court correctly concluded the Longshore Harbor Workers' Compensation Act ("LHWCA") does not give rise to complete preemption. Petitioner fails to cite a case which has reached the opposite conclusion.

STATEMENT OF THE CASE

I. SUIT IS FILED IN STATE COURT.

This case involves the asbestos-related disease and death of Joseph "Frenchy" Hernandez, the respondent's husband. Mr. Hernandez was employed by SSA Gulf from 1964 to 1969 and from 1971 to 1972. Plaintiff-respondent alleges that Mr. Hernandez was substantially exposed to asbestos during his employment with SSA Gulf.

Ms. Hernandez filed suit in state court and alleged state-law causes of action against a number of defendants, including SSA Gulf. The Petition for Damages does not mention the Longshoremen and Harbor Workers Compensation Act, 33 U.S.C. §901 *et seq.*, nor any other federal statute, regulation, or law.

II. THE FEDERAL COURT PROCEEDINGS.

A.

SSA Gulf removed the case on the basis of federal question jurisdiction, asserting plaintiff's claims were completely preempted by the LHWCA. No other basis for removal was alleged.

Ms. Hernandez moved to remand because the Fifth Circuit had repeatedly concluded that the LHWCA does not give rise to complete preemption. In the lead case, *Aaron v. National Union Fire Ins. Co.*, 876 F.2d 1157 (5th Cir. 1989), the Fifth Circuit analyzed whether the LHWCA completely preempted state law. The court found that "the LHWCA is . . . nothing more than a statutory defense to a state-court cause of action – the classic circumstance of non-removability." *Id.* at 1166. The Court of Appeals reached the same conclusion, twelve years later, in *Garcia v. Amfels, Inc.*, 254 F.3d 585, 588 (5th Cir. 2001).

SSA Gulf responded that *Beneficial Nat'l Bank v. Anderson*[1] changed the test for complete preemption and,

[1] 539 U.S. 1, 123 S. Ct. 2058, 156 L.Ed.2d 1 (2003). SSA Gulf also cited *Aetna Health Inc. v. Davila*, 124 S. Ct. 2488, 159 L.Ed.2d 312 (2004) in support of removal. For the reasons discussed in the district court's order, *Aetna* does not implicitly overrule *Aaron* and its progeny.

consequently, *Aaron* and *Garcia* were no longer good law. SSA Gulf asked the district court to ignore these cases and find that removal was proper under the LHWCA.

B.

The trial court rejected SSA Gulf's arguments and granted plaintiff's motion to remand. Based on *Hoskins v. Bekins Van Lines,*[2] the court concluded that *Beneficial* changed the third prong of the Fifth Circuit's complete-preemption test, but did not change the first two prongs of the test. Petition for Writ of Certiorari, Appx. B at 8a. As a result, *Aaron* (which found the LHWCA failed to satisfy all three prongs of the test) remained good law, and remand was appropriate due to a lack of subject matter jurisdiction. *Id.* at 9a.

SSA Gulf subsequently filed a Petition for Writ of Mandamus in the Fifth Circuit, seeking review of the remand order. SSA Gulf did not meaningfully address whether the Court of Appeals enjoyed appellate jurisdiction in light of §1447(d). Plaintiff-respondent, therefore, filed an opposition to the petition for mandamus, raising this jurisdictional defect. Shortly thereafter, the Fifth Circuit denied the petition. *See* SSA Gulf's Petition for Writ of Certiorari, Appx. A.

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[2] 343 F.3d 769 (5th Cir. 2003).

REASONS FOR DENYING THE WRIT

The case is not appropriate for Supreme Court review for the reasons discussed below.

I. THE FIFTH CIRCUIT PROPERLY DENIED THE PETITION FOR MANDAMUS.

There is no doubt the Fifth Circuit properly denied SSA Gulf's petition for mandamus. The district court remanded the case due to a lack of jurisdiction under §1447(c); consequently, §1447(d) prohibited review of the remand decision.

A. Section 1447(d) And The Applicable Jurisprudence.

28 U.S.C. §1447(d) prohibits review of remand orders based on a lack of subject matter jurisdiction. The statute provides in pertinent part: "An order remanding a case to the State court from which it was removed is not reviewable on appeal **or otherwise**. . . . " (Emphasis added). As set forth below, Congress barred review of remand orders whether by appeal **or** mandamus proceedings.

1.

The "[r]eviewability of a remand order depends entirely upon the trial court's stated grounds for its decision to remand." *Tillman v. CSX Transp., Inc.*, 929 F.2d 1023, 1026 (5th Cir.), *cert. denied*, 502 U.S. 859

(1991).[3] The trial court brings "its remand order within the absolute immunity from review of 28 U.S.C. §1447(d) by expressly referring to a lack of jurisdiction as one of the bases of its decision to remand." *Id.* at 1024. Thus, a remand based on §1447(c) for lack of subject matter jurisdiction cannot be appealed. *See Things Remembered, Inc. v. Petrarca,* 516 U.S. 124, 127 (1995); *Copling v. Container Store, Inc.*, 174 F.3d 590, 596 (5th Cir. 1999).

Similarly, a remand order based on a lack of subject matter jurisdiction is not reviewable by mandamus proceedings. In *Thermtron Products, Inc. v. Hermansdorfer*, 432 U.S. 336 (1976), this Honorable Court indicated §1447(d) "prohibits review of all remand orders issued pursuant to §1447(c) whether erroneous or not and whether review is sought by appeal **or by extraordinary writ**." (Emphasis added).

The Fifth Circuit recently held that a remand order based on a lack of subject matter jurisdiction is not reviewable by a writ of mandamus. In *Victor v. Grand Casino-Coushatta*, 359 F.3d 782, 784 (5th Cir. 2004), the Court of Appeals stated: "Appellate courts are precluded from reviewing remand orders issued pursuant to §1447(c), by appeal, **mandamus**, or otherwise." (Emphasis added) (quotations omitted).

2.

A remand order based on §1447(c) is not reviewable even if the decision was plainly erroneous. *See Thermtron,*

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[3] *See also Heaton v. Monogram Credit Card Bank*, 231 F.3d 994, 997 (5th Cir. 2000), *cert. denied*, 533 U.S. 915 (2001).

432 U.S. at 351; *Heaton*, 231 F.3d at 997. The purpose of this blanket prohibition against appellate review of §1447(c) remand orders is to prevent delay through protracted litigation of jurisdictional issues. *See Thermtron*, 432 U.S. at 351.

B. The Trial Court's Order Granting Remand Was Expressly Based On §1447(c) And Therefore Cannot Be Reviewed Under §1447(d).

The district court expressly and unequivocally stated in its order that remand was "pursuant to 28 U.S.C. §1447(c)" due to a lack of subject matter jurisdiction. Petition, Appx. B at 11a. As a result, the Fifth Circuit lacked appellate jurisdiction over the petition for writ of mandamus under §1447(d) and properly denied such relief. This would have been true even if the district court had plainly erred (which it did not) in granting the remand. *See Thermtron*, 432 U.S. at 351; *Copling*, 174 F.3d at 596.

C. Petitioner's Arguments Regarding Appellate Jurisdiction Are Misplaced.

1.

Petitioner primarily relies on two cases to support its claim that appellate jurisdiction exists here. The first is *Thermtron*. Taking a quote out of context, SSA Gulf suggests that appellate jurisdiction exists where a court of appeals needs to correct an erroneous remand ruling. Petition at 23. *Thermtron* does not stand for this proposition. Rather, the Court made clear that appellate review

was appropriate only where a remand order was based on grounds **other than** a lack of jurisdiction.

SSA Gulf's reliance on *In re CSX Transp. v. Shives*, 151 F.3d 164 (4th Cir. 1998) is equally misplaced. There, the district court remanded the case under 28 U.S.C. §1445(a). The court found that the plaintiff was not covered by the LHWCA and, therefore, the FELA claim should not have been removed. *Id.* at 166-67. Because remand was not based on §1447(c), and because the district court's decision on the LHWCA's applicability was a predicate to its remand ruling, the Fourth Circuit reviewed the remand order. *Id.* at 166-68.

The facts here, of course, are totally different. The district court specifically remanded under §1447(c) after analyzing the complete-preemption issues. No ruling was made on whether the decedent (Mr. Hernandez) was covered by the LHWCA. Accordingly, §1447(d) prohibits review of the remand ruling herein.

2.

If the Court were to adopt the view that appellate jurisdiction exists whenever a defendant believes a remand order is in error, state court proceedings would be seriously disrupted. For example, would a state court have jurisdiction over a remanded case if the defendant appeals the remand order? Assuming the state court does have jurisdiction, should it proceed with the case while the possibility remains that the remand order will be reversed? If the state court proceeds with the case, will any of its rulings survive a subsequent reversal of the remand order?

Congress wisely minimized these issues when it enacted §1447(d) and prohibited appellate review in cases like this one.

II. THE PETITION SHOULD BE DENIED BECAUSE THERE IS NO INTER-CIRCUIT CONFLICT REQUIRING THE COURT'S ATTENTION.

Even assuming, for the sake of argument, that appellate jurisdiction exists here, the petition should be denied because there is no inter-circuit conflict necessitating the Court's intervention. The Fifth Circuit properly refused to consider SSA Gulf's petition for mandamus due to a lack of appellate jurisdiction. This decision is not in conflict with the applicable case law.

The Fifth Circuit's decision, moreover, does not conflict with the Fourth Circuit's ruling in *Shives*. Here, the only issue was whether the LHWCA gave rise to complete preemption for removal purposes. *Shives,* however, did not address the complete-preemption doctrine; instead, the court focused on whether the plaintiff was covered by the LHWCA based on the facts presented therein. *Shives*, 151 F.3d at 168-71.

III. THE PETITION SHOULD BE DENIED BECAUSE THE REMAND RULING IS CONSISTENT WITH THE COURT'S COMPLETE-PREEMPTION CASES.

The Fifth Circuit's decision to deny SSA Gulf's writ of mandamus was proper. The district court analyzed the impact of the *Beneficial* decision and correctly concluded the LHWCA does not give rise to complete preemption.

A.

The district court began its analysis with a review of the well-pleaded complaint rule, and the Fifth Circuit's test for complete preemption. Petition for Writ of Certiorari, Appx. B at 3a-6a. The court then analyzed the Fifth Circuit's decision in *Hoskins* and concluded that while *Beneficial* modified the third prong of the test (dealing with Congressional intent), it left the first two prongs unchanged. *Id.* at 6a-7a.

Having reached this conclusion, the district court found that *Aaron* remained good law. While *Beneficial* changed the third prong of the complete-preemption test, *Aaron* had not been decided solely on this factor. The LHWCA did not give rise to complete preemption because none of the three factors were met. *Id.* at 8a-9a.

B.

The district court's complete-preemption ruling is consistent with *Beneficial* for another reason. Congress did **not** intend for the LHWCA to be the plaintiff's exclusive remedy against SSA Gulf. Mr. Hernandez had a choice between Louisiana law and the LHWCA in connection with his claim for pain and suffering (the "survival claim").

Mr. Hernandez's survival claim is governed by the law in effect at the time the claim accrued. In a mesothelioma case, a claim accrues when the plaintiff is substantially

exposed to asbestos.[4] Plaintiff alleged that Mr. Hernandez was substantially exposed to asbestos prior to 1975 while working for SSA Gulf and the other defendants, and these exposures caused his mesothelioma.[5]

In this time frame, **concurrent** jurisdiction existed between the LHWCA and state workers' compensation laws. In *Sun Ship, Inc. v. Pennsylvania,*[6] the Court recognized this overlapping jurisdiction, explaining:

> [W]e are not persuaded that the bare fact that the federal and state compensation systems are different gives rise to a conflict that, from the employer's standpoint, necessitates exclusivity for each compensation system. . . . Mandating exclusive jurisdiction will *not relieve employers of their distinct obligations under state and federal compensation law*. (Emphasis added).[7]

Thus, a Louisiana plaintiff who was eligible for LHWCA benefits could instead choose to pursue state compensation benefits. The LHWCA was not the plaintiff's exclusive remedy.[8]

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[4] *See Austin v. Abney Mills Inc.*, 824 So.2d 1137, 1141 & 1151-55 (La. 2002).

[5] Petition at ¶11 & 21.

[6] 447 U.S. 715, 722, 100 S. Ct. 2432, 65 L.Ed.2d 458 (1980).

[7] *Sun Ship*, 447 U.S. at 725.

[8] Another exception to the LHWCA is for intentional torts. Here, plaintiff alleged intentional misconduct by SSA and the other stevedoring defendants, thereby allowing her to assert claims in tort, outside the LHWCA. Petition at ¶20; *Charlot v. Bethlehem Steel Corp.*, 838 F. Supp. 312, 316 (E.D. Tx. 1993) (discussing intentional tort exception).

C.

In *Poche v. Avondale Shipyards, Inc.*,[9] the Louisiana Supreme Court addressed the issue whether an injured plaintiff, who was eligible for LHWCA benefits, could choose Louisiana law, opt out of the compensation scheme, and sue in tort for his injuries. The answer was "yes": the injured worker could institute a tort action against his co-employees provided that he had not elected to pursue his remedies under the LHWCA.[10]

Based on the foregoing principles, the LHWCA was not Mr. Hernandez's exclusive remedy against SSA Gulf. When his claim accrued, concurrent jurisdiction existed between the LHWCA and Louisiana's worker's compensation scheme.[11] In the Petition, plaintiff specifically selected Louisiana law, opted out of the state compensation scheme, and alleged that SSA Gulf and the other stevedoring defendants were liable for causing Mr. Hernandez's mesothelioma.[12]

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[9] 339 So. 2d 1212 (La. 1976).

[10] *Id.* at 1220-22.

[11] Concurrent jurisdiction ended in Louisiana in 1990. That year, the Louisiana legislature amended the workers' compensation act to require a plaintiff to pursue benefits under the LHWCA if available. *See* La. Rev. Stat. 23:1035.2.

[12] Petition at ¶20. Mr. Hernandez was entitled to sue his employers directly in tort for his mesothelioma, because this disease fell outside the workers' compensation scheme prior to 1976. *Austin*, 824 So.2d 1145-46. He did not have to sue his co-employees, the alleged executive officers.

CONCLUSION

The petition for writ of certiorari should be denied. The Fifth Circuit properly denied mandamus relief given the lack of appellate jurisdiction. Moreover, there is no inter-circuit dispute on whether the LHWCA gives rise to complete preemption.

Petitioner incorrectly suggests that the district court's reliance on *Aaron* will disrupt the LHWCA statutory scheme. In the fifteen years since *Aaron* was decided, no such disruption has occurred.

Respectfully submitted,

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